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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 236

WILLIAM EVANS, MEMBER OF THE BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, ET AL., APPELLANTS

v.

TILLYE CORNMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (A. 17–26) is reported at 295 F. Supp. 654.

JURISDICTION

Appellees brought suit against certain local election officials under 28 U.S.C. 1343, 1357, 2201 and 2202 and 42 U.S.C. 1983 and 1988, challenging the validity of Article I, Section 1 of the Constitution of the State of Maryland as authoritatively construed by the Maryland Court of Appeals. A district court of three judges, convened pursuant to 28 U.S.C. 2281, decided

in favor of appellees and on February 19, 1969, enjoined the enforcement of the State constitutional provision against appellees. On March 17, 1969, the Attorney General of Maryland and members of the Board of Supervisors of Elections of Baltimore City filed a motion to intervene as parties defendant, which motion was granted on April 10, 1969, with the consent of the defendants and with no objection from appellees (A. 28). The instant appeal resulted. Appellants' notice of appeal to this Court was filed on April 14, 1969, and the Court noted probable jurisdiction on October 13, 1969. The Court's jurisdiction of this appeal rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether, consistent with the Equal Protection Clause, the residents of a federal reservation located within the geographical boundaries of a State, who are subject to taxation and other substantial regulation of their activities by the State and its political subdivisions, can be deprived of the right to vote in federal, State and local elections because the federal government still exercises some jurisdiction over the land on which they live.

STATEMENT

Appellees reside on the grounds of the National Institutes of Health, a federal reservation located within the geographical boundaries of Montgomery County in the State of Maryland.

On October 19, 1968, ten of the appellees, registered voters within Montgomery County in the State of

Maryland, were advised by the Permanent Board of Registry of Montgomery County that their names would be removed from the county's voting rolls because they did not qualify as voters in Maryland under Article I, Section 1, of the Maryland Constitution,[1] since they lived on federal property. The two other appellees attempted to register to vote during 1968, but were not permitted to do so for the same reason.

Contending that the application of Article I, Section 1, of the Maryland Constitution, as interpreted by the Maryland Court of Appeals in *Royer* v. *Board of Election Supervisors,* 231 Md. 561, 191 A. 2d 446, certiorari denied, 375 U.S. 921, violated the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, appellees brought suit in the United States District Court for the District of Maryland, seeking both declaratory and injunctive relief. They asked the court to prohibit the individual members of the Montgomery County Board of Registry from removing the names of the ten registered appellees and to compel the registration of the two appellees seeking registration for the first time. The defendants claimed that the previously registered appellees' names should be removed from the voting rolls and that all of them should be excluded from voting because of the exclusive jurisdiction of the federal government over the grounds of the National Institutes of Health where they resided.

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[1] In relevant part, this provision limits the right to vote in State and local elections to "citizen[s] of the United States * * * who [have] been resident[s] of the State for one year, and of * * * the county * * * for six months next preceding the election" (see J.S. 3–4).

On October 28, 1969, the district court, pursuant to 28 U.S.C. 2284(3), issued a temporary restraining order preserving the status quo by allowing the ten previously registered appellees to remain on the voting rolls, but refusing to grant the two remaining persons the right to register, noting the imminence of the national election of November 5, 1968 (A. 12). In entering this order the district court stated that "[t]he case presents a grave constitutional question, on which there appears to be a paucity of authority" (A. 11).

On January 29, 1969, the three-judge district court held that Article I, Section 1, of the Maryland Constitution, as construed in the *Royer* case, was invalid as applied to appellees in that it denied them equal protection of the laws. It stated the issue involved as "whether Maryland has undertaken to impose on residents of this federal enclave obligations and duties of State citizenship to such a degree that it would amount to unconstitutional discrimination if the right to vote were not likewise granted," in view of the substantial retrocession of jurisdiction by the federal government to the State over the area concerned (A. 20). Determining from a survey of pertinent State and federal legislation that "the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years" and that "[t]he rationale of the earlier decisions denying the right to vote to a resident of a federal enclave has been undercut by the various retrocessions by

Congress of its otherwise exclusive jurisdiction" (A. 22, 23), the court concluded that "on balance the plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote" (A. 25). This is so, the court stated, because "the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed cannot be constitutionally denied" (A. 25–26). It concluded: "A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations" (A. 25).

The court's order granting appellees relief was issued on February 19, 1969, and the Attorney General of Maryland and members of the Board of Supervisors of Elections of Baltimore City subsequently filed a motion to intervene as parties defendant. The district court, with the consent of the defendents (who had indicated an intention not to appeal), and with no objection interposed by the appellees, granted the motion to intervene. A direct appeal to this Court followed.

In its order noting probable jurisdiction, the Court invited the Solicitor General to express the views of the United States.

ARGUMENT

INTRODUCTION AND SUMMARY

Appellants' argument is grounded on the premise that the federal government exercises exclusive jurisdiction[2] over the territory here in question, pursuant to Art. I, Sec. 8, Cl. 17, of the federal Constitution. Thus, the initial question is whether such exclusive jurisdiction does in fact exist here. In our view, the district court correctely concluded that that question must be answered negatively.

While appellants point to a number of minor obligations that bind other State residents but from which persons living in the federal enclave are excused,[3] the only significant obligation mentioned is liability for

[2] Earlier cases in State courts held that where the federal government has "exclusive jurisdiction," residents of such enclaves were not State residents for voting purposes. *Opinion of the Justices*, 42 Mass. 580; *Sinks* v. *Reese*, 19 Ohio St. 306. By way of contrast, more recent decisions have reached the same result as the district court on this issue. See *Rothfels* v. *Southworth*, 11 Utah 2d 169, 356 P. 2d 612; *Adams* v. *Londeree*, 139 W. Va. 748, 83 S.E. 2d 127; *Arapajolu* v. *McMenamin*, 113 Cal. App. 2d. 824, 249 P. 2d 318.

[3] Appellants' jurisdictional statement argues that appellees: (1) are not part of the unorganized militia and are not subject to compulsory military service at the call of the State; (2) are exempt from the State's compulsory education laws; (3) are exempt from State jury service; (4) are not subject to compulsory commitment in State mental institutions; (5) are not subject to State liquor, minimum price and occupational licensing laws; and (6) are not subject to arrest and prosecution by State authorities for certain offenses committed on the federal reservation. Appellants recognize, however, as they must, that the Federal Assimilative Crimes Act (18 U.S.C. 13) has given the State authority to prosecute acts not punishable by a specific congressional enactment.

property taxes.[4] But individuals residing on property of the federal government, such as the National Institutes of Health, are required to pay income, sales, use, gasoline, and other excise taxes to the State the same as any State resident. They are, moreover, subject to State unemployment insurance and workmen's compensation laws, and may be prosecuted under State criminal statutes for offenses occurring in the federal enclave. Their children attend local schools, and the State courts are open to them for divorce and adoption proceedings. In short, it cannot be maintained that the federal government has *exclusive jurisdiction* over the area. In these circumstances, we submit that State action denying appellees the right to vote solely because they reside on federal property violates the Equal Protection Clause.

APPELLEES ARE DENIED EQUAL PROTECTION BY THE MARYLAND LAW PROHIBITING THEM FROM VOTING IN FEDERAL, STATE AND LOCAL ELECTIONS BECAUSE OF THEIR RESIDENCE IN A FEDERAL ENCLAVE, WHILE THEY ARE SUBJECT TO TAXATION AND OTHER SUBSTANTIAL REGULATION BY THE STATE

1. At the outset, it may be well to emphasize the limited issue presented here. This case does not involve the question whether States can constitutionally establish minimum periods of residence before allowing persons to vote. Thus, *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md.), affirmed, 380 U.S. 125, on which appellants rely (J.S. 5), is inapposite. That case concerned the validity of the State's residency require-

[4] Actually, appellants' contention is that residents of the federal enclave have no obligation to pay real property taxes, since there is no personal property tax levied in Maryland.

ment for voting in presidential elections, and did not deal in any way with the entitlement of those living on federal reservations, who met that residency requirement, to vote in federal, State and local elections. Similarly, *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633 (as explained in *Burns* v. *Richardson,* 384 U.S. 73, 91–92), on which appellants also rely (J.S. 5–6), is irrelevant. *WMCA* and *Burns* did no more than recognize that States could properly exclude certain persons from the voting rolls so long as the classifications necessarily involved were rational ones. Finally, it should be noted, there is no problem of possible mootness here. Accordingly, this Court's recent decision in *Hall* v. *Beals,* No. 39, this Term, decided November 24, 1969, is not pertinent. In that case the Court found moot a challenge to a State residency requirement for voting in presidential elections which had later been amended so that, had it been in effect when the appellants there had moved to Colorado, they would have been entitled to register and vote in the election which, in any event, had already been conducted. The instant controversy—over whether appellants are entitled to be registered to vote in federal, State and local elections in Maryland—remains a live one, since if they are so entitled it is on a continuing basis, without regard to any particular election, and their pleadings were so framed. Moreover, the issue presented is one that requires resolution since it "reflects a continuing controversy in the federal-state area" involving voting rights. *Moore* v. *Ogilvie,* 394 U.S. 814, 816.

It might also be pointed out initially that appel-

lants' contention that the Equal Protection Clause is inapplicable because appellees are not persons within the jurisdiction of the State of Maryland (J.S. 11) assumes the answer to the very question here at issue. Appellees are plainly entitled to the protection of that constitutional provision with respect to those aspects of State authority retroceded to Maryland by the federal government. At issue here is whether the State's effort to differentiate appellees from those not living on federal reservations, in regard to voting in various elections, is grounded on rational considerations and also meets the more stringent "compelling state interest" standard enunciated in several recent decisions of this Court (see *infra,* pp. 9–10, 15–16).

2. Although the States "have broad powers to determine the conditions under which the right of suffrage may be exercised" (*Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 50), the Court has long recognized that classifications made in such statutes must, at the least, be reasonable (see, *e.g., McGowan* v. *Maryland,* 366 U.S. 420, 425–426). Moreover, it has been made increasingly clear that any alleged infringements on the right to vote "must be carefully and meticulously scrutinized" (*Reynolds* v. *Sims,* 377 U.S. 533, 562). And, even more recently, the Court has expressly rejected the "rational basis" test in the voting context, holding that the exclusion of otherwise qualified individuals from the electoral process is constitutionally justifiable only where it is necessary in order to promote a "compelling state interest" (*Kramer* v. *Union School District,* 395 U.S. 621, 627–630; *Cipriano* v. *City*

of Houma, 395 U.S. 701, 704, 706; see, also, *Carrington* v. *Rash,* 380 U.S. 89, 96; *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 665, 670; *Williams* v. *Rhodes,* 393 U.S. 23, 29.

In our view, it matters little whether the "rational basis" test or the "compelling state interest" test is applied in the instant case. Under either standard, denial of the franchise to residents of the property of the National Institutes of Health deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the federal Constitution.

3. Under Art. I, Sec. 8, Cl. 17 of the United States Constitution, Congress is empowered to "exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The land on which the appellees resided was ceded by Maryland to the United States in 1953, with the State reserving the right to serve its civil and criminal processes on the reservation. Earlier cases had held that where the federal government has exclusive jurisdiction over an enclave, persons residing in such enclaves are not State residents for voting purposes (see note 2, *supra*). But those decisions, as well as *Royer* v. *Board of Election Supervisors,* 231 Md. 561, 191 A. 2d 446, certiorari denied, 375 U.S. 921, upon which the appellants rely heavily (J.S. 6, 7, 9, 10), were based on a status which no longer is enjoyed by persons residing in federal en-

claves.[5] Indeed, a look at the legislation returning jurisdiction over federal reservations to the States shows that no adequate argument can any longer be made in order to deny the franchise, in federal, State, and local elections, to residents of federal enclaves like the National Institutes of Health.[6]

a. Since 1948, the Federal Assimilative Crimes Act (18 U.S.C. 13) has provided that, within an enclave, "acts not punishable by an enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated." *United States* v. *Sharpnack*, 355 U.S. 286, 287. That statute not only allows enforcement of State laws enacted before the effective date of the Act, but also those which are subsequently enacted by the State.

b. The so-called "Buck Act" (4 U.S.C. 104 *et seq.*), passed in 1947, retroceded to the States much of the taxing power over residents of federal reservations which had previously been withheld from them. Under this statute, the residents of an enclave are required

[5] In a similar vein, appellants' citation of a number of decisions dealing with the ramifications of exclusive federal jurisdiction (*e.g.*, J.S. 9) is not helpful in resolving the question here posed—against the background of federal retrocession and in the voting context here involved. See, in this regard, *Howard* v. *Commissioners of Louisville*, 344 U.S. 624, 626–627, on which the district court properly relied in this regard (see A. 23–24).

[6] It should be noted that the enactments retroceding jurisdiction to the States were passed prior to 1953, the time when the National Institutes of Health received the land on which appellees live. Therefore, with respect to appellees the State has always had jurisdiction over many of their activities.

to pay State taxes with respect to "sales, purchases, storage, or use of gasoline or other motor vehicle fuels"; a State or its taxing authority is given "full jurisdiction and power to levy and collect" sales and use taxes "in any Federal area within such State * * * as though such area was not a Federal area"; and no resident of a federal enclave "shall be relieved from liability for any income tax levied by any State * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State * * * shall have full jurisdiction and power to levy and collect [income taxes] * * * as though such area was not a Federal area."

c. Federal law makes residents of federal enclaves, such as appellees, subject to state unemployment insurance (26 U.S.C. 3305) and workmen's compensation (40 U.S.C. 290) laws.

d. That the State of Maryland has seen fit to exercise its extensive jurisdiction over the residents at the National Institutes of Health is reflected by the fact that residents of the federal reservation are required to register their automobiles and obtain drivers' permits and license plates in Maryland. The children residing in the enclave attend Montgomery County schools, for which the county receives twice the allotment of federal funds that it receives for children of federal employees who do not reside on federal property (see 20 U.S.C. 236–244, 631–645). And Maryland allows enclave residents to resort to its State courts in divorce and adoption proceedings (see A. 22).

4. In addition to the weight which must be accorded the substantial financial and legal relationships of appellees with the State of Maryland, consideration should be given to the interest which the residents of the National Institutes of Health, as responsible citizens, naturally take in the policies of the county and State surrounding them, policies affecting their lives as well as the lives of their children, policies which they will be unable to influence if they do not have the right to vote. The distinctions advanced by appellants to explain the denial of the franchise to appellees have little relevance to the actual interworking between residents of the National Institutes of Health and the surrounding community. Rather, they appear to be artifiicial differences advanced essentially as afterthoughts to seek to justify an exclusionary voting policy not grounded on rational considerations and certainly not warranted by any "compelling state interest." In view of the critical nature of the important right involved,[1] as well as the particular facts of this case, denial of the franchise to residents of the National Institutes of Health is hardly a reasonable exercise of the State's authority to prevent persons who do not have a bona fide and direct interest from exercising a political voice in community affairs.

Although appellants' point that appellees do not contribute to the county through property taxes is true on its face, in practical effect it is not so substantial as to undermine the holding below. The argument is

[1] See, *e.g.*, *Wesberry* v. *Sanders*, 376 U.S. 1, 17; *Carrington* v. *Rash*, 380 U.S. 89; *Williams* v. *Rhodes*, 393 U.S. 23; *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663.

that whereas other Maryland residents are required to pay property taxes on the land they own, if the residents of a federal reservation owned real property within the enclave, it would not be taxable. Such a situation is not involved in this case, however, as none of the appellees owns land in the reservation. And, although it is possible for a private individual to own land in a federal area, or to lease it, ownership is nonetheless rare. With respect to schools, which are largely supported by property taxes, Congress has made provision for special payments to the State. Moreover, there are many others in the community who neither own nor rent real property,[8] and yet are allowed to vote. Indeed, the very issue involved in *Kramer* v. *Union School District,* 395 U.S. 621, decided last Term, was whether a non-parent who neither owned nor leased real property could be excluded from the voting rolls for school board elections—a situation not far removed from that presented here. There the Court held that such an exclusion violated the Equal Protection Clause.[9] A like result is called for in the instant case.

5. Further elaboration seems unnecessary. The district court's well-reasoned opinion, written before this

[8] Lessees can of course be viewed as contributing indirectly to the payment of real property taxes, since those taxes are undoubtedly taken into account in the fixing of rentals.

[9] See *Cipriano* v. *City of Houma*, *supra*, and the dissenting opinion in the lower court in *Kramer* (282 F. Supp. 70, 75–86); see also this Court's decision in *Carrington* v. *Rash*, 380 U.S. 89, holding invalid a Texas restriction preventing servicemen from voting, *despite* their ownership of real property, unless they had resided in the particular county at the time they entered the service.

Court's decision in *Kramer*, adequately shows that there is no rational basis for excluding appellees from the franchise. At all events, in *Kramer* the Court expressly rejected application of the "rational basis" test in voting cases, and required instead that the "compelling state interest" standard be utilized in such circumstances, saying (395 U.S. at 626–628):

> Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. * * * *Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable.* See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [Emphasis added.]

If the Maryland restriction involved here does not meet the "rational basis" test, as the district court properly concluded, then *a fortiori* the reasons set forth by appellants are insufficient to justify the chal-

lenged statute under the more stringent standard enunciated in the intervening *Kramer* and *Cipriano* decisions.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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